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In the Court of Criminal Appeals of Texas
At Austin

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COURT OF CRIMINAL APPEALS
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No. 14-18-00162-CR
In the Court of Appeals
For the Fourteenth District of Texas
At Houston

———♦———

No. 1530454
In the 177th District Court
Of Harris County, Texas

———♦———

Vincent Depaul Stredic
Appellant

v.

The State of Texas
Appellee

———♦———

State's Brief on Discretionary Review

———♦———

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Trial Court:

> **Robert Johnson**, presiding judge

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Statement of the Case

The appellant was indicted for murder. (CR 21). The indictment alleged two prior felony convictions, with one for an offense committed after the other conviction became final. (CR 21). The appellant pleaded not guilty but a jury found him guilty as charged. (3 RR 9-10; CR 148). The jury found both enhancement paragraphs true and assessed punishment at thirty years' confinement. (CR 160, 165). The trial court certified the appellant's right of appeal, and the appellant filed a notice of appeal. (CR 169, 170).

In a since withdrawn opinion, a split panel of the Fourteenth Court originally affirmed the appellant's conviction in November 2019. (Appendix B to State's PDR). In dissent, Justice Spain argued the non-constitutional error in the case—giving the jury five pages of accurate transcript that responded to a jury request to "see" disputed testimony—required automatic reversal because it was "impossible" to conduct a "meaningful" harm analysis. (*Id.*, Spain, J., dissenting).

After the appellant filed a motion for en banc reconsideration, the panel withdrew its opinion and, in a published opinion written by Justice Spain, a split panel reversed the appellant's conviction and remanded the case for a new trial. *Stredic v. State*, 609 S.W.3d 257 (Tex. App.—Houston [14th Dist.] 2020, pet. granted). The State filed a motion for reconsideration, which

prompted the prevailing two justices of the panel to issue a "Supplemental Majority Opinion." *Id.* at 269. That opinion again reversed the trial court's judgment and remanded for a new trial.

Grounds for Review

1. The Fourteenth Court erred by holding a trial court cannot grant a jury's request for a transcript of disputed testimony.

2. The Fourteenth Court erred by conducting a harm analysis that did not consider the strength of the State's evidence, the weakness of the defense, or the lack of a logical connection between the supposed error and any legally determinative issue.

Summary of the Argument

The panel majority's opinion is wrong on the merits, and its harm analysis failed to consider several important factors.

On the merits, the panel majority failed to point to a law the trial court violated. Instead, it held a statute allowing one procedure was an implicit bar on similar procedures. But most things a trial court does are not explicitly allowed by statute. Holding that every act not explicitly allowed by statute is error is reversal in search of a reason. The Fourteenth Court's approach is counter to the approach this Court has recently taken for a procedure not explicitly allowed by statute, as well as old cases from this Court dealing with predecessor statutes to Article 36.28.

The panel majority's harm analysis ignored several factors this Court requires appellate courts to consider. The Fourteenth Court focused exclusively on the supposed error itself. The Fourteenth Court did not consider the strength of the State's case, the weakness of the appellant's defense, or the fact that the transcript did not bear on a legally determinative issue. The opinion glosses over the facts of the case, but the undisputed evidence showed the appellant was upset with the complainant and pointed a shotgun at his head; the only dispute was whether he pulled the trigger or whether the gun just "went off." The transcript the trial court gave the jury was the appellant's consistent statements that he was afraid when he pointed the shotgun at the complainant. Self-defense was not an issue in this case.

Statement of Facts

The appellant was driving three of his friends around. (5 RR 87-91). They made fun of the appellant for driving too slow. (5 RR 96). Eventually the appellant pulled into a gas station to get gas, though he did not pull up to a pump. (5 RR 96-98). The appellant and the complainant, Christopher Barriere, briefly went into the gas station. (5 RR 99).

When Barriere, returned, he and another passenger, Rodrick Harris, talked outside the car. (5 RR 99). The appellant opened the trunk and got out a shotgun. (5 RR 98-99). The appellant walked to the driver's door, holding

the shotgun down by his side. (State's Ex. 31). The appellant walked back behind the car and shot Barriere in the head, killing him. (5 RR 101-02).

Harris charged at the appellant, but retreated when the appellant pointed the gun at him. (5 RR 102, 105). The appellant got in the car and drove away. (5 RR 108). Harris went to look at Barriere's body. (5 RR 107). The appellant drove back up and menaced Harris with the shotgun. (5 RR 108). When Harris backed away, the appellant drove off again. (5 RR 109).

About 5 minutes later, the appellant parked slightly offsite and returned, this time shooting Harris in the face and a bystander in the ankle. (4 RR 95-96; 5 RR 110).

These events are mostly caught on video; the second shooting takes place just off camera, though the reactions of bystanders are obvious. State's Exhibit 31 has eight converted video files. CH13.avi and CH14.avi show different angles of the offense. Here are the times in the videos at which important events occur:

Event	**CH13.avi**	**CH14.avi**
First shooting	22:00-23:00	19:15-21:10
Appellant returns	24:30-25:22	21:40-22:30
Second shooting	31:00-32:00	28:00-28:30

The appellant gave an ambiguous statement to police admitting he was at the scene, but not admitting he was the shooter. (6 RR 39; *see* State's Ex. 36). At trial, the appellant testified that when he returned from inside the gas station he found Barrierre and Harris high on PCP, so he told them to leave his car. (6 RR 59, 62, 96). When they refused, he retrieved the shotgun. (6 RR 68). According to the appellant, Barriere and Harris got out of the car and got confrontational. (6 RR 71-72). The appellant claimed he pointed the shotgun above Barriere and, even though the appellant's finger was not on the trigger, the gun "went off" and shot Barriere in the head. (6 RR 73-74).

The appellant testified he was unaware the round hit Barriere. (6 RR 74-75). But the appellant also testified the reason he returned to the scene was to check on Barriere's status. (6 RR 98).

Procedural Background

I. In the Trial Court: The jury asked to "see" disputed testimony. Over the appellant's objection, the trial court gave the jury five pages of transcript.

During deliberations, the jury asked to "have access to the [appellant's] testimony." (CR 125). The trial court replied: "If the jury disagrees as to the statement of any witness, they may, upon applying to the court, have reproduced that part of such witness['s] testimony on the point in dispute." (CR

125). The jury sent another note: "Can we see the portions of the defendant's testimony where he states whether or not he felt threatened by the deceased or the second complainant?" (CR 126). The trial court responded with a form quoting Article 36.28 and asking the jury to certify what testimony it disagreed about. (CR 127).

The jury said it disagreed about the appellant's testimony on direct examination: "Did he feel threatened by Christopher Barriere and [Rodrick] Harris?" (CR 127). The jury also sent another note:

> The jury is in disagreement as to the statement of a witness. Can we see the court reporter's notes when [the appellant] was the witness, when the State['s] Attorney was questioning him regarding his statement or if [the appellant] felt threatened by Christopher Barriere and [Rodrick] Harris.

(CR 128).

The trial court told the parties it intended to respond: "The Court will provide you readback concerning the defendant and the statement in dispute by transcript." (7 RR 52). Defense counsel objected, claiming that providing a transcript was a "comment on the weight of the evidence," and violated his Sixth Amendment right to a fair trial, his Fourteenth Amendment right to due process, and due course of law. (7 RR 53). Defense counsel explained that "providing a written transcript creates a greater emphasis and places more importance on that particular testimony since jurors must recall from their

own … what they heard as far as the other issues are concerned." (7 RR 52-53).

The prosecutor said this procedure was allowed by Code of Criminal Procedure Article 36.28. (7 RR 53). The prosecutor argued it was appropriate to give the jury a transcript because "that is specifically what the jury is asking for." (7 RR 53).

Defense counsel responded that "[t]o the extent Article 36.28 would permit a written transcript of testimony under these circumstances," it violated the state and federal constitutions. (7 RR 54). Defense counsel specified, though, he did not object to the actual content of the transcript, because it responded to the jury's dispute. (7 RR 54-55).

The trial court sent back five partial pages of transcript, all of which related to whether the appellant was afraid when he pointed the gun at Barriere. (CR 129-133). Nothing in the transcript described the appellant's culpable mental state when he shot Barriere.

II. In the Fourteenth Court

A. The appellant argued that giving the jury the transcript violated Article 36.28. The State replied that Article 36.28 did not prohibit giving the jury a transcript.

On appeal, the appellant claimed "the law does not permit the court to provide the jury with a written transcript of … disputed testimony." (Appellant's Brief at 19). For this assertion, the appellant quoted Article 36.28, which is silent about giving the jury a transcript:

> In the trial of a criminal case in a court of record, if the jury disagree as to the statement of any witness they may, upon applying to the court, have read to them from the court reporter's notes that part of such witness testimony or the particular point in dispute, and no other; but if there be no such reporter, or if his notes cannot be read to the jury, the court may cause such witness to be again brought upon the stand and the judge shall direct him to repeat his testimony as to the point in dispute, and no other, as nearly as he can in the language used on the trial.

TEX. CODE CRIM. PROC. art. 36.28.

The only case the appellant cited for his proposition was *Garrett v. State*, 658 S.W.2d 592 (Tex. Crim. App. 1983). Garrett complained that the jury was allowed to read a transcript of an audio recording while the recording was played at his trial. This practice had been forbidden in an earlier case, but *Garrett* held there was no error. *Id.* at 593. In doing so, like many opinions from its era, *Garrett* added some dicta about unrelated laws, including Article 36.28: "Since the transcript was not introduced and not available during jury

deliberations, there was no danger of the jury having the evidence before them during deliberations in violation of [Article 36.28], and thereby being unduly influenced by it."

Here, the State made two reply arguments. First, it argued the appellant's Article 36.28 argument was unpreserved because it differed from his trial argument. (State's Appellate Brief at 2-4). Second, the State noted the appellant did "not point to any statute that the trial court violated." (*Id.* at 4). The State also noted "the holding in *Garrett* has no relevance to this case, and *Garrett's* dicta is not controlling here." (*Id.* at 6).

B. After first affirming, the Fourteenth Court granted rehearing and reversed without addressing the State's arguments.

On original submission the Fourteenth Court affirmed. (Appendix B to State's PDR). In an opinion by Justice Wise, the court held that any error would not have caused enough harm to warrant reversal. In a dissent, Justice Spain argued that Rule of Evidence 606—prohibiting juror testimony about deliberations—made a "meaningful" harm analysis "impossible." Justice Spain also commented that finding the error harmless turned the court into a "super legislator" and "effectively repeal[ed]" Article 36.28.

On the appellant's motion, the panel granted rehearing and reversed. In a majority opinion by Justice Spain, the panel majority held that "the plain

meaning" of Article 36.28 is "clear." *Stredic*, 609 S.W.3d at 260. The panel pointed out that Article 36.28 "only expressly authorizes oral readback of the court reporter's notes," and "does not authorize the trial court to provide the jury with a written transcript." *Ibid.* The majority concluded the trial court "clearly abused its discretion." *Ibid.*

The majority concluded the error was harmful because it was a comment on the weight of the evidence: "[T]he provision of excerpts from the court reporter's notes in transcript form concerning an essential element of the alleged offense[1] to be assessed and considered as written evidence in the jury room … amounted to an impermissible comment on its importance by the trial court and unfairly tipped that balance in favor of the State…" *Id.* at 264. The majority concluded it harmed the appellant to give the jury a copy of his testimony because his testimony "indicated he could not maintain a consistent story about what happened and what he felt during the incident, *i.e.*, his culpable mental state.[2]"

The majority ended its harm analysis with an echo of Justice Spain's original dissenting opinion: "[W]e can never know for sure what influenced

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[1] This is wrong. The transcript did not concern an element of the offense.

[2] This is also wrong. The transcript concerned whether he was afraid when he pointed the gun at Barriere, not whether he acted intentionally, knowingly, recklessly, or negligently by shooting Barriere. Fear could fit with any of these mental states.

this jury in making its verdict, given the almost impenetrable wall surrounding deliberations. *See* TEX. R. EVID. 606(b)." *Ibid.* The majority found the error harmful and reversed.

Justice Zimmerer joined the majority and wrote a concurring opinion. Citing *Garrett* and *Lewis v. State*, 529 S.W.2d 533 (Tex. Crim. App. 1975),[3] he argued the jury might have been "unduly influenced" by the transcript, and the transcript constituted "bolstering."[4] *Stredic*, 609 S.W.3d at 265-66 (Zimmerer, J., concurring). Justice Zimmerer compared what occurred here to the "hurt" caused by having "one's own words … selectively recalled" in an argument "with a close friend or spouse." *Id.* at 266-67. He concluded the error required reversal because the transcript "appear[ed] to be the critical testimony upon which the appellant was convicted of the aggravating factor."[5] *Id.* at 267.

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[3] Citing both *Garrett* and *Lewis* is peculiar, because *Garrett* largely abrogated the relevant holding in *Lewis*. *See Guerra v. State*, 760 S.W.2d 681, 691 (Tex. App.—Corpus Christi 1988, pet. ref'd) (recognizing *Garrett* "substantially discarded" *Lewis*).

[4] Wouldn't a defendant want his testimony bolstered? The harm of bolstering was improperly *strengthening* a witness's testimony. At any rate, "bolstering" is no longer a standalone objection. *Rivas v. State*, 275 S.W.3d 880, 886-87 (Tex. Crim. App. 2009).

[5] Justice Zimmerer did not explain what "the aggravating factor" for murder was, nor how the appellant's testimony about his fear was "critical" to proving it.

Justice Wise agreed that the trial court erred but believed the error did not warrant reversal. *Ibid.* (Wise, J., dissenting). Justice Wise cited two cases, including one from this Court, holding that this sort of error was harmless. *Id.* at 268 (citing *Miller v. State*, 79 S.W.2d 328 (1935) and *Higdon v. State*, 764 S.W.2d 308 (Tex. App.—Houston [1st Dist.] 1998, pet. ref'd)).[6] Justice Wise pointed out it was the jury, not the judge, who requested the transcript, so it was not a judicial comment on the weight of the evidence. *Ibid.* He also pointed out that the transcript concerned the same testimony that would have been read aloud under Article 36.28, and it came from both direct and cross-examination. He noted that there was significant other evidence about the appellant's mental state, and the State's closing argument focused on other evidence of the appellant's intent, such as his actions. *Ibid.*

[6] The majority addressed these cases in a footnote. *Stredic*, 609 S.W.3d at 263 n.4. The majority distinguished *Miller* by claiming it "involved a bill-of-exceptions procedure that no longer exists" and did not discuss "preservation of any statutory violation." The majority distinguished *Higdon* because the harm holding there was an alternate holding.

C. On a second rehearing, the panel addressed the State's arguments. The majority held that Article 36.28 banned all alternative methods of providing the jury with disputed testimony.

The State moved for rehearing, pointing out the court had not addressed its arguments. The panel granted rehearing and issued a "supplemental majority opinion" again reversing the trial court. *Id.* at 269 (op. on reh'g).

The majority rejected the State's preservation argument and held the appellant's objection that "providing a written transcript creates a greater emphasis and places more importance on that particular testimony" preserved the complaint that providing a transcript violated Article 36.28. *Id.* at 270.

As for the State's argument that Article 36.28 does not prohibit giving the jury a transcript, the panel majority called this an "implausible" reading of the statute. *Ibid.*

> While the statute does not spell out all of the potential ways the jury is *not* allowed to review the testimony of a witness, it is not difficult to connect the dots and conclude that procedures not authorized by the plain language of the article are prohibited.

Ibid. (emphasis in original). Much like the concern Justice Spain expressed in his original dissent about courts becoming "super legislator[s]" if they did not reverse for statutory violations, the panel majority declared the State's inter-

pretation incorrect because it "would render [A]rticle 36.28 a nullity, a toothless provision merely containing two examples of ways in which testimony possibly might be provided to the jury, as opposed to delineating the only two ways the jury is permitted to receive it." *Ibid.*

Ground One

The Fourteenth Court erred by holding a trial court cannot grant a jury's request for a transcript of disputed testimony.

I. Article 36.28 does not prohibit giving the jury a transcript in response to a question about disputed testimony.

The majority's claim that it was easy to "connect the dots" and conclude that anything not explicitly authorized by statute is forbidden ignores the reality that many—perhaps most—things in a typical trial are not explicitly allowed by statute. If appellate courts reversed every time a trial court acted without explicit statutory authorization, there would be a lot of unjust reversals.

In its motion for rehearing, the State pointed to *Milton v. State*, 572 S.W.3d 234 (Tex. Crim. App. 2019), where this court acknowledged that, despite no statute or rule explicitly allowing it, trial courts had discretion to permit parties to use visual aids in closing argument. Under the panel majority's "connect the dots" approach, this Court's opinion in *Milton* was wrong—after

all, Articles 36.07 and 36.08 allow the parties to make "addresses" to the jury, but do no mention showing them pictures or videos.

Milton's approach to a procedure that is not explicitly authorized shows how this Court should treat this case. *Milton* held that visual aids were permissible even without a rule or statute explicitly allowing them, but the visual aids still had to abide by the general rules that apply to jury arguments. Thus where the visual aid in *Milton* presented a danger for unfair prejudice, it was exactly as objectionable as would have been a verbal argument that was also unfairly prejudicial.

Milton's approach reflects the approach taken by the Rules of Appellate Procedure. Appellate courts must ignore any non-constitutional error, defect, irregularity, or variance that did not affect a defendant's substantial rights. If the trial court's actions did not violate a law, what substantial right, *exactly*, was violated?

How should this Court review a trial court's decision to give a jury a transcript? The same as it does any other judicial communication with the jury. There's no statute explicitly allowing the trial court to give the jury a transcript, just like there's no statute explicitly allowing the trial court to tell the

jury, "Good morning."[7] But there are general rules that control judicial communications with the jury.

This Court has emphasized that the point of Article 36.28 is "to balance our concern that the trial court not comment on the evidence with the need to provide the jury with the means to resolve any factual disputes it may have." *Thomas v. State*, 505 S.W.3d 916, 923 (Tex. Crim. App. 2016)(quoting *Howell v. State*, 175 S.W.3d 786, 790 (Tex. Crim. App. 2005)). Cases where judges have violated this statute have revolved around what evidence the trial court did or did not have read to the jury. By giving the jury too much testimony, or testimony about which the jury does not have a disagreement, the trial court is effectively conveying its opinion that certain testimony was important.

That's not a concern here because the transcripts directly responded to a jury question about disputed testimony. The panel majority held that granting the jury's request for the transcript was a judicial comment on the weight of the evidence, but, as the dissent pointed out, that's just wrong. Any import the jury gave to this testimony began and ended with the jury itself. It's far

[7] Broad application of the Fourteenth Court's reasoning—if a statute allows for one action, it is an implicit bar on similar actions not mentioned in the statute—quickly becomes ridiculous. For instance, Article 36.21 requires the sheriff to furnish jurors with "a suitable room" for deliberations and "such necessary food and lodging as he can obtain." The Fourteenth Court's "connect the dots" approach would interpret this as a prohibition on giving jurors chairs, beverages, or unnecessary foods like dessert.

more likely the jury would have inferred a comment from the trial court's refusal to give them a transcript than from merely granting a specific request. deny the request could be interpreted as a judicial comment. *See United States v. Eghobor*, 812 F.3d 352, 360 (5th Cir. 2015) (noting that denying jury's request for transcript "could be interpreted as a judicial comment").

In this case the trial court did not comment on the weight of the evidence or violate any other law. The Fourteenth Court erred by holding it did. This Court should reverse and hold that if it is permissible for a trial court to have testimony read back to the jury, it is also permissible to give them a transcript of that testimony.

II. The Fourteenth Court's approach conflicts with this Court's interpretations of predecessor statutes.

This Court's opinions about predecessor statutes track the State's proposed approach to Article 36.28: They focus on the content of the testimony given to the jury, not how it is given. This Court has followed that approach even when the trial court gave the jury testimony through unauthorized means.

Since at least 1856, Texas law has provided for what to do when the jury disagrees about a witness's testimony. Beginning with the original Code of Criminal Procedure and running until 1953, the sole statutory remedy was to

have the witness recalled so he could "detail his testimony to the particular point of disagreement, and no other, and he shall be further instructed to make his statement in the language used upon his examination as nearly he can." TEX. CODE CRIM. PROC. art. 615 (1856); TEX. CODE CRIM. PROC. art. 697 (1879); TEX. CODE CRIM. PROC. art. 735 (1895); TEX. CODE CRIM. PROC. art. 755 (1911); TEX. CODE CRIM. PROC. art. 755 (1925); *see* Act of June 8, 1953, 53rd Leg. R.S., ch. 373 §§ 1, 3, 1953 Tex. Gen. Laws 907, 907-08 (establishing current system of jury readback from court reporter's notes, and declaring legislative emergency because there was no provision allowing readback of disputed testimony from court reporter's notes).

In early times there were likely no transcriptions for many or most cases. At any rate, transcriptions were disallowed on appeal so there was little incentive to make them for criminal cases. *See Emmons v. State*, 29 S.W. 474 (Tex. Crim. App. 1895) (striking verbatim transcription from the record because under then-applicable rules statement of facts consisted of court reporter's summary of testimony).

Beginning in 1907, the Legislature allowed transcriptions into statements of facts for criminal cases, but they had to be "condensed so as to not contain the questions and answers," unless the trial court determined those were important. George Dix & John Schmolesky, 43B TEX. PRAC., CRIMINAL

PRACTICE AND PROCEDURE § 55.88 (Westlaw 2021) ("Dix"); TEX. CODE CRIM. PROC. art. 846 (1911). In 1951 the Legislature authorized routine use of the sort of verbatim appellate transcripts we're used to today. Dix, § 55.88.

Thus between 1907 and 1953, court reporters were making transcripts for appellate purposes, but there was no statutory authorization for the trial court to use these transcripts to help the jury with disputed testimony. Several cases from this period show that trial courts were having the transcripts read to juries during deliberations, despite the lack of statutory authorization. As best the State can tell, every time a defendant complained about this irregularity this Court affirmed. The holdings expressed a belief that reading the transcript was close enough to the prescribed procedure that it was not error, and at any rate it was not harmful if the transcript was accurate. The State can find no cases from this period expressing disapproval of the procedure.

This Court expressed approval for transcript readbacks in dicta in earlier cases, [8] but it was not until 1921 it addressed the issue on the merits. In

[8] For instance, in *Moore v. State*, 107 S.W. 355 (Tex. Crim. App. 1908), the jury requested to have testimony read back, but after being told the court stenographer had gone home for the day, reached a verdict. This Court noted in dicta: "It was, of course, clearly the right of the jury to have the testimony requested read to them." *Moore*, 107 S.W. at 366. *See also Wesley v. State*, 150 S.W. 197 (Tex. Crim. App. 1912) (stating it was "not error" to grant jury's request to have transcript read to them, but noting defendant's only objection was that his counsel was not present for the readback).

Byrd v. State, 235 S.W. 891 (Tex. Crim. App. 1921), "[d]uring their deliberations the jury came into court and asked for the reproduction of certain testimony. The court stenographer read from the evidence of the witness indicated until stopped by that jury's statement that was all they wanted." *Byrd*, 235 S.W.at 893 (op. on motion for reh'g). Defense counsel requested that more testimony be read to the jury; the jury said they didn't want any more. On appeal, this Court held there was no error because if the jury wanted more testimony they could have asked for it. *Id.* at 894. This Court expressed no concern that the procedure was unauthorized.

This Court addressed the matter more thoroughly in *Gandy v. State*, 261 S.W. 145 (Tex. Crim. App. 1924). There, the jury had a disagreement about a key witness's testimony, but the witness had returned home to "a distant county" after testifying. *Gandy*, 261 S.W. at 145. The jury requested a transcript of his testimony be read back. The trial court granted the request.

Gandy complained about this on appeal. This Court noted the then-current statute allowing a witness to be recalled for disputed testimony, Article 755, "was enacted before the use of stenographers became general and before the court stenographer became an officer of the Court."[9] *Id.* at 146. Relying

[9] In a similar way, Article 36.28 has not kept up with developments in stenography. When the Legislature began allowing readbacks in 1953, the stenographer's notes would have been a series of phonetic symbols. The stenographer could have read these symbols for the

on prior cases where the practice had been approved of in dicta, this Court held "the procedure followed was in substantial accord with [Article 755]." *Ibid.* This Court held, though, that even if the practice did not follow Article 755, "it was within the inherent power of the court to have the court reporter read … the official record of the testimony in question." *Ibid.* Finally, this Court held that because Gandy did not allege the transcript was inaccurate, "there is an absence of injury, and a reversal should not result from the action taken." *Ibid.*

Gandy became the rule. *See Moore v. State*, 99 S.W.2d 915, 916-17 (Tex. Crim. App. 1936) (no error where trial court had transcript read back after jury asked for testimony of witness who had been excused); *Box v. State*, 27 S.W.2d 538, 539 (Tex. Crim. App. 1930) (op. on motion for reh'g) (where record showed that trial court had transcription read to jury but failed to show why, there was no error because *Gandy* and *Byrd* allowed procedure); *Woods*

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purposes of readback, but printing an English transcript for the jury to read on its own would have been time consuming. *See* "What is a Stenographer? Everything You Have Wanted to Know About Shorthand Typists," https://www.naegeliusa.com/blog/naegeli-blog/what-is-a-stenographer/ (accessed March 26, 2021) ("Of course, typing in phonetic syllables does not create your typical English sentence—it does not even include spaces. Older versions of the stenotype created lists of complex characters or punches in a paper that had to be interpreted later and written into an understandable English translation."). Modern court reporters use computer software that creates real-time English translations of the shorthand.

v. State, 10 S.W.2d 90 (Tex. Crim. App. 1928) (where defendant did not object to readback, noting in dicta that procedure was allowed by *Gandy* and *Byrd*)

The only case from this era cited by the Fourteenth Court, *Miller v. State*, 79 S.W.2d 328 (Tex. Crim. App. 1935), also engages in a content-based analysis of readbacks. There, a witness who testified at an examining trial left the state before trial so the State introduced the transcript of his prior testimony. *Miller*, 79 S.W.2d 329. The jury requested that this transcript be sent back during deliberations. Miller objected and asked that the jury be brought into the court room for a readback, but the trial court granted the jury's request and sent the transcript back.

This Court's ultimate holding was that this did not warrant reversal because Miller had not shown how this harmed him. *Id.* at 330. Along the way, though, this Court curiously declared that Article 678 of the 1925 Code of Criminal Procedure would have allowed for the trial court to bring the jury back to the court room have the court reporter read the disputed testimony. On the face of the statute that was wrong: Before the 1953 amendment Article 678 did not provide for readbacks. But this statement tracked *Gandy's* and *Byrd's* interpretation of the statute.

In the Fourteenth Court, Justice Wise cited *Miller* in his dissent as an example of a court holding that it was harmless to give the jury a transcript of

disputed testimony. *Stredic*, 609 S.W.3d at 268. That's largely correct, but the fact that *Miller* dealt with transcribed testimony from the beginning means the situation in that case isn't a perfect fit. But *Miller* was thematically on-point: It shows that when this Court analyzed irregularities with resolving disputed testimony, it looked at the content of what was given to the jury, not the procedure.

Rather than distinguish *Moore* in a relevant manner—*Miller* may be old, but it is still published authority from a superior court—the Fourteenth Court panel majority dismissed *Miller* because it "involved a bill-of-exception procedure that no longer exists, and there is no discussion of error preservation of any statutory violation." *Id.* at 263 n.4. The bill-of-exceptions distinction is frivolous—virtually every pre-1966 appeal involved a bill-of-exceptions procedure that is no longer in use, and the panel majority failed to explain how this was relevant to the result. *See Mathews v. State*, 635 S.W.2d 532, 537 (Tex. Crim. App. 1982) (describing history of bills of exception in Texas). And the Fourteenth Court was wrong to claim *Miller* did not address preservation: "[T]he appellants objected because the jury should have been brought into open court and the same should have been given to the jury in open court." *Miller*, 79 S.W.2d at 330.

The panel majority criticized *Miller's* harm analysis because it "consisted of a conclusory determination that the defendants had not met their burden to show 'some injury to themselves…'" *Stredic*, 609 S.W.3d at 263 n.4. But criticizing a higher court's analysis is not, under ordinary notions of stare decisis, a basis for ignoring it. And the Fourteenth Court failed to consider that maybe *Miller's* analysis was "conclusory" because the answer was obvious.[10]

In at least two other cases this Court confronted situations, like *Miller*, where a transcript of a witness's testimony at an earlier proceeding was introduced, and the jury disagreed about what it said. Even though there was no statutory procedure for what to do in that situation, in both cases this Court held the trial court did not err by having the transcript read back to the jury. In *Clark v. State*, 12 S.W. 729 (Tex. Ct. App. 1889), this Court held there was no error where the trial court had the transcription of a witness's examining trial testimony reread to the jury three times in response to jury disagreements. This Court declared there was no error based on the content of the readback: "[W]e cannot see how its being reread in the same identical language could mislead the jury or unjustly prejudice the defendant." *Clark*, 12 S.W. at 731-

[10] This might also explain any deficiencies in *Miller's* discussion of preservation or the merits. Appellate courts often dispose of issues on harm when the complained-of matter is clearly harmless.

32. In *Orner v. State*, 183 S.W. 1172 (Tex. Crim. App. 1916), this Court followed *Clark* to reject a defendant's complaint about having a witness's transcribed testimony from a prior trial reread in response to jury disagreement.

One final pre-1953 case merits attention for its treatment of a novel readback procedure. In *Cranfill v. State*, 235 S.W.2d 146 (Tex. Crim. App. 1950) the trial court had the witnesses' testimony tape recorded. When the jury disagreed about a witness's testimony, but the witness had left, the trial court played back the recording of the relevant testimony. *Cranfill*, 235 S.W.2d at 353. This Court held that "[t]he careful trial court seems to have followed the rule laid down in Art. 678," which was not true on the face of Article 678, but tracked *Gandy's* and *Byrd's* reading of the statute.

What happened here is that the trial court granted the jury's request for disputed testimony in a manner not explicitly authorized by statute. While the exact facts of this case are novel, the legal issue is much like those addressed in old cases from this Court. Those cases show that this Court is fine with variances in procedure so long as the testimony given to the jury is what they requested. This Court should reverse the Fourteenth Court's judgment and hold, consistent with its old cases and with the current text of Article 36.28, that if it would be permissible for the trial court to have testimony read back

in open court, there is no prohibition on giving the jury a transcript of requested testimony.

Ground Two

The Fourteenth Court erred by conducting a harm analysis that did not consider the strength of the State's evidence, the weakness of the defense, or the fact that the supposed error did not bear on a legally determinative issue.

Although the panel majority's harm analysis takes up most of the opinion, it contains remarkably little content. The harm analysis consists of 1) repeating, several times, that there was error; 2) seriously misstating the import of the transcribed testimony; and 3) complaining that Rule of Evidence 606's prohibition on inquiring into jury deliberations makes harm analyses hard. *Stredic*, 609 S.W.3d at 261-64. The majority failed to consider the strength of the State's case, the weakness of the defense, or the fact that the transcribed testimony was tangential to any legally determinative issue.

Five years ago in *Thomas*, this Court emphasized that a proper harm analysis for Article 36.28 error must consider the entire record. *Thomas v. State*, 505 S.W.3d 916, 927 (Tex. Crim. App. 2016). There, the court of appeals's harm analysis looked only at the content of the statements that were read back to the jury. Although this Court affirmed in *Thomas*, it noted that the court of appeals's harm analysis was too narrow:

> In assessing the likelihood that the jury's decision was adversely affected by the error, the reviewing court should consider all of the testimony and physical evidence admitted for the jury's consideration, the nature of the evidence supporting the verdict, the character of the alleged error and how it might be considered in connection with other evidence in the case, and closing arguments.

Id. at 927.

Here, the panel majority made the same mistake as the court of appeals in *Thomas*, focusing almost exclusively on the content of the transcript.

A comparative review of the evidence of guilt and the defensive evidence shows the evidence of an intentional killing was overwhelming. The appellant was on video pointing a shotgun at a man's head and shooting him. His defense—that the gun randomly just "went off" at the precise moment he was pointing it at someone's head[11]— was ridiculous; if guns just "went off," people wouldn't have them, and gun manufacturers would go out of business under the weight of lawsuits. The appellant did not introduce the shotgun into evidence to show it had a mechanical defect, nor did he testify the gun just "went off" on other occasions.

The appellant said he did not rack the shotgun after he got it from the trunk, meaning it had had a round in the chamber the entire time he was

[11] The appellant even denied pointing the gun at Barriere. (6 RR 91). He claimed he pointed it in the air above Barriere, though the results of the shot prove that was incorrect. On the video, the appellant appears to point the gun slightly downward.

driving around. (*See* 7 RR 87). The appellant's defense hinged on a loaded shotgun bouncing around in his trunk for a long drive without going off, but then it went off, without a trigger pull, in the appellant's hands at a very unlucky moment.

On the video, the appellant does not look like someone who just had a 12-gauge unexpectedly go off in his hands. The appellant has the composure to immediately point the gun at Harris when Harris charged him. He showed no obvious concern for Barriere, and he chased Harris away before casually getting into the car and driving off. He returned twice to menace Harris, shooting him the second time. When he spoke with police he said nothing about being the shooter. Aside from the appellant's own testimony, nothing in the record suggests this was an accident.

The panel majority also misstated the logical relevance of the transcribed testimony. The majority opinion said the testimony related to an element of the offense, and the concurrence said it was "critical" to proving the "aggravating factor." Both descriptions are wrong.

The transcribed testimony related only to whether the appellant was afraid when he pointed the gun at Barriere. This was not a self-defense case—the appellant specifically said he did not shoot Barriere in self-defense, and the jury was not charged on self-defense. Whether the appellant was afraid

when he pointed the gun might have interested the jury, but it did not resolve whether he acted intentionally or knowingly when he shot Barriere.

Part of the majority's finding of harm hinged on its statement that the transcript was "especially" a comment on the weight of the evidence because the "appellant's testimony indicated he could not maintain a consistent story about what happened and what he felt during the incident, *i.e.*, his culpable mental state." *Stredic*, 609 S.W.3d at 263-64. That's wrong for two reasons. First, the transcribed testimony did not highlight any inconsistencies; the appellant was very consistent that he was afraid of Barriere and Harris when he pointed the gun. Second, whether the appellant was afraid of Barriere was not his culpable mental state; his culpable mental state was whether he intentionally or knowingly killed Barriere. The appellant's fear before doing so is tangential to that issue.

The panel majority limited its harm analysis to the error itself; that's the approach this Court denounced in *Thomas*. In doing so, the majority reversed a murder conviction where the evidence of guilt is overwhelming, the defensive evidence was incredible, and the supposed error did relate to a legally determinative issue. This Court should do a proper harm analysis, as shown by *Thomas*, and reverse the Fourteenth Court: The evidence of guilt was strong,

the defensive evidence was weak, and the supposed error did not relate to a legally determinative issue.

Conclusion

The State asks this Court to reverse the Fourteenth Court's judgment and reinstate the trial court's judgment.

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